Supreme Court, U.S.
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NO. 90-1560

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JACKIE DALE LOWRIMORE, SR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April, 1991

QUESTIONS PRESENTED

A. Was Petitioner's conviction based upon unfairly prejudicial evidence of murder as opposed to evidence supporting the indictment?

B. Can a violation of the Sixth Amentment to the United States Constitution at sentencing, which results in imposition of additional incarceration time, be harmless error?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as United States v. Lowrimore, 923 F. 2d. 590 (8th Cir. 1991) and contained herein at Appendix A.

The Order denying Rehearing by the panel appears at Appendix B.

JURISDICTION

Judgment affirming Petitioner's jury trial conviction was rendered on January 11, 1991.

Order denying rehearing on sentencing issues was rendered on February 28, 1991.

This Honorable Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254 (1) and Rule 10.1 (a) of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution;

1. Amendment VI, in pertinent part;

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

II. Federal Statutes;

1. Title 18 U.S.C. Section 1958 (a), in pertinent part;

> Whoever travels in or causes another . . . to travel in interstate or foreign commerce, . . . with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of

pecuniary value, . . . and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both;

. . .

2. Rule 403 of the Federal Rules of Evidence, in pertinent part;

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .

3. Rule 404 (b) of the Federal Rules of Evidence, in pertinent part;

Evidence of other crimes, wrongs, or acts is not admissible . . . It may,

however, be admissible

for other purposes, such as

proof of motive, . . . intent,

. . .

STATEMENT OF THE CASE

A. CONVICTION

Petitioner was convicted in the United States District Court for the Western District of Arkansas, Fort Smith Division, for conspiracy to use interstate commerce facilities in the commission of murder for hire (Count One) and aiding and abetting in the use of interstate commerce facilities in the commission of murder for hire (Count Two), in violation of Title 18 U.S.C. Section 1958 (a), Title 18 U.S.C. Section 371 and Title 18 U.S.C. Section 2. Petitioner's ex-wife, Shirley Lowrimore, received a non-fatal shotgun wound on July 22, 1989 as a result of the alleged conspiracy.

Prior to Federal indictment, Petitioner was charged in Oklahoma State Court with the murder of his ex-wife who was found dead on September 29, 1989. Conviction on the

Oklahoma State Court murder charge did not occur until October 12, 1990, well after the briefing cycle was completed in the United States Court of Appeals for the Eighth Circuit.

Petitioner attempted to prevent Respondent's use of any evidence concerning the Oklahoma murder charge prior to and during the course of trial. Petitioner's pre-trial Motion in Limine was at least partially sustained as the District Trial Court ruled that Respondent could not mention the Oklahoma murder charge during the trial but could present evidence of any actions Petitioner took up to the murder.

B. SENTENCING

Petitioner objected to hearsay statements contained in the Pre-Sentence Report prepared by the Respondent's Probation and Parole Officer. The Probation and Parole

Officer testified at sentencing hearing that much of the Pre-Sentence Report came from Respondent's case file without personal interview or any independent attempt to verify the accuracy of the hearsay statements contained within the Pre-Sentence Report. The Trial Court accepted the Pre-Sentence Report as accurate and sentenced Petitioner to Two Hundred Sixty-two (262) months of imprisonment, three (3) years of supervised release, a fine of Twenty Thousand Dollars ($20,000.00) and a special assessment of One Hundred Dollars ($100.00). Petitioner's incarceration time includes a four (4) level enhancement attacked by Petitioner as being based upon hearsay statements.

C. **APPEAL**

Petitioner timely appealed to the United States Court of Appeals for the Eighth Circuit asserting improper use of the

Oklahoma murder charge evidence at trial and violation of Petitioner's rights under the Sixth Amendment to the United States Constitution at sentencing hearing. Conviction was affirmed by opinion filed on January 11, 1991, even though the Eighth Circuit Court of Appeals did find violation of Petitioner's Sixth Amendment Rights under the United States Constitution, at sentencing hearing.

Petitioner timely requested Rehearing on the issue of sentencing. Rehearing was denied on February 22, 1991.

Petitioner now timely requests this Honorable Court to grant a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, allowing review of the issues presented herein.

ARGUMENT

I. CONVICTION

Petitioner's conviction is based upon unfairly prejudicial evidence of the Oklahoma murder charge.

Petitioner's, ex-wife, Shirley Lowrimore received a non-fatal shotgun wound on July 22, 1989. (Federal conviction). Ms. Lowrimore was then found dead three (3) months later on September 29, 1989. (Oklahoma murder charge). The Federal indictment under Title 18 U.S.C. Section 1985 (a) alleged and required Respondent's proof of personal injury to the victim. Throughout trial, Respondent continually offered evidence of the victim's murder over Petitioner's pre-trial and trial objections.

Respondent's assumption of the additional burden of proof of the victim's murder allowed unfairly prejudicial evidence to go to the jury.

ERROR 1: OKLAHOMA MURDER CHARGE

Prior to trial, the District Trial Court ruled that Respondent could not mention the Oklahoma murder charge. Appendix A, pg. 5A. Respondent's first witness testified about a conversation with Petitioner after Petitioner had been charged and posted bond. Appendix A, pg. 5A. The United States Court of Appeals for the Eighth Circuit found no error in this testimony finding no evidence of direct knowledge by the jury of the Oklahoma murder charge and failure to request a limiting instruction on other charges. Appendix A at pg. 6A.

Petitioner asserts that a request for a limiting instruction on other criminal charges with the first witness to testify in the trial, immediately after the witness had testified about other charges, would have only given the jury direct knowledge of the

Oklahoma murder charge. Any limiting instruction would have only highlighted the Oklahoma murder charge as opposed to keeping it from the jury. Petitioner's only remedy for the unfairly prejudicial evidence which violated the District Trial Court's pre-trial Order was the requested mistrial.

ERROR 2: DISGUISE TESTIMONY

Petitioner's cross examination testimony of disguise worn the day his ex-wife was found dead was allowed as being probative of intent under Rule 404 (b) of the Federal Rules of Evidence. Appendix A, pg.s. 6A and 7A. The United States Court of Appeals for the Eighth Circuit in upholding the testimony found that the testimony, ". . . , tends to prove that Lowrimore murdered his wife. It also tends to prove that Lowrimore wanted his wife dead badly enough to do it himself, which, in turn, makes it more likely

he would have hired someone else to do the job." Appendix A, pg. 7A.

"he first two (2) statements of the above clearly indicate that the testimony proved guilt of murder. The testimony is then stretched to include proof of intent to commit the Federal crime in the last statement of the above.

Rule 403 of the Federal Rules of Evidence is asserted as barring this testimony especially if the testimony has to be stretched to fit under Rule 404 (b) of the Federal Rules of Evidence. Additionally, the testimony is evidence of Petitioner's actions after the murder as opposed to actions up to the murder, again in violation of the District Trial Court's Pre-Trial Order. Appendix A, pg. 5A.

ERROR 3: IMPROPER STATEMENT

Respondent stated on cross-examination of Petitioner, "You know, Mr. Lowrimore, I have seen you testimony, this is the third time, and the main thing that struck me - - I've never seen any remorse that your wife is dead, Mr. Lowrimore." Appendix A, pg. 8A. This was not a question on cross-examination but rather an inaccurate statement. Petitioner had only testified twice. Appendix A, pg. 8A. The statement placed Respondent's counsel in the position of a witness carrying an inference of outside knowledge. See: United States v. Dawkins, 562, F. 2d. 567, 569 (8th Cr. 1977).

Petitioner asserts that the above errors establish Respondent's use of unfairly prejudicial evidence of the Oklahoma murder charge, inadmissable under Rule 403 of the Federal Rules of Evidence, throughout the

course of a one and one-half (1 1/2) day trial, resulting in Petitioner's conviction of the Federal crime.

II. SENTENCING

Petitioner received additional incarcertion time based upon hearsay evidence in violation of the Sixth Amendment to the United States Constitution.

The opinion of the United States Court of Appeals for the Eighth Circuit finds violation of Petitioner's Sixth Amendment Right under the United States Constitution. Appendix A, pgs. 9A - 11A. Improper procedure was used at sentencing when the District Trial Court accepted the Pre-Sentence Report as accurate over Petitioner's hearsay objections to portions of the Pre-Sentence Report. Appendix A, pgs. 9A and 10A. Testimony by Respondent's Probation and Parole Officer who prepared the Pre-Sentence Report revealed no independent attempt to

determine the veracity of the hearsay statements gleaned from Respondent's case file. Appendix A, pgs. 9A and 10A. The opinion found harmless error in the Sixth Amendment violation as "The District Court was entitled to rely upon its recollection of testimony at Lowrimore's trial. The hearsay statements in the Report made by Jeremy Parker, Ronnie Woodson, and Harlan Daniel Sweeten, none of whom testified at trial, were inconsequential to the determination of Lowrimore's sentence."

Petitioner received a four (4) level enhancement, ". . . for being an organizer or leader of a criminal activity involving five or more participants, or which was otherwise extensive, Section 3B1.1 (a)." Only three (3) other possible criminal activity participants testified at trial.

The District Trial Court in using

recollection must have recalled hearsay testimony from the three (3) who actually testified at trial by way of hearsay concerning the other three (3) who did not appear and testify at trial. Petitioner asserts that allowing use of the District Trial Court's recollection and departing from United States v. Fortier, 911 F. 2d 100 (8th Cir. 1990) resulted in Petitioner receiving additional incarceration time in violation of the Sixth Amendment to the United States Constitution. The additional incarceration time rises to more than harmless error.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant a Writ of Certiorari for the reasons asserted herein.

Respectfully submitted;

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Appendix A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1952WA

United States of America,

Appellee,

v.

Jackie Dale Lowrimore, Sr.,

Appellant.

On Appeal from the United States District Court for the Western District of Arkansas.

Submitted: October 26, 1990

Filed: January 11, 1991

Before ARNOLD, Circuit Judge, FLOYD R. GIBSON and HEANEY, Senior Circuit Judges.

ARNOLD, Circuit Judge.

Jackie Dale Lowrimore, Sr., appeals from a jury conviction for his part in a murder-for-hire scheme targeting his ex-wife. Shirley Lowrimore was murdered in LeFlore Coun-

ty, Oklahoma, on September 29, 1989.[1] This case was brought in federal district court in Arkansas[2] as a result of events preceding the murder, including a non-fatal shooting of Shirley Lowrimore on July 22, 1989, in Fort Smith, Arkansas. The two-count indictment alleged that Lowrimore used interstate-commerce facilities in a conspiracy for the commission of murder for hire (count one), and that he aided and abetted in the use of interstate-commerce facilities in the commission of murder for hire (count two), in violation of 18 U.S.C. §§ 2, 371, and 1958(a). The jury returned guilty verdicts on both counts. Lowrimore was sentenced to 262 months of imprisonment, three years of supervised release, and to pay a fine of $20,000 and a special assessment of $100. We affirm.

The government's version of the events surrounding the July 22, 1989, shooting, which the jury was entitled to believe, is as follows. In April 1989, Lowrimore offered Jimmy

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[1] After the trial of this case, Lowrimore was convicted in an Oklahoma state court of murdering his former wife, and sentenced to life in prison without parole.

[2] The Hon. H. Franklin Waters, Chief Judge, United States District Court for the Western District of Arkansas.

Thomas $1200, and the forgiveness of debt a Thomas owed Lowrimore of approximately $1100, to kill his ex-wife. At that time, Shirley Lowrimore was living in Arkansas. Lowrimore and Thomas lived in Oklahoma. Thomas gave the $1200 to Ronnie Woodson for Shirley Lowrimore's murder, but Woodson failed to follow through on his obligation, and never returned the money to Thomas.

Thomas then hired Phillip Allen Potter, who also lived in Oklahoma, to kill Shirley Lowrimore. Potter agreed to the killing for $350 -- $200 to purchase a used car for himself, and $150 for expenses in connection with an upcoming move. Thomas supplied Potter with three guns obtained from Lowrimore and lent Potter a vehicle to drive from Oklahoma to Arkansas. Potter and several friends[3] made numerous trips in May and June seeking an opportunity to kill Lowrimore's ex-wife. On July 22, outside her apartment in Fort Smith, Shirley Lowrimore was shot several times with a .20 gauge shotgun. She survived this attack but required

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[3]Potter testified that he was accompanied on some of the trips by Jeremy Parker, Lee Martin, Keith Butler, and Harlan Daniel Sweeten. Lee Martin and Jeremy Parker accompanied Potter on the night that Shirley Lowrimore was shot. Tr. I-154, 156.

hospital treatment. Immediately after the shooting, Potter reported to Thomas (mistakenly, as it turned out) that his group had killed Shirley Lowrimore.

Potter and Thomas testified at Lowrimore's trial. Thomas told the jury that Lowrimore provided him with weapons and keys to Shirley Lowrimore's apartment and car, in addition to the $1200 in cash. Tr. I-70-71. Thomas also stated that after the July 22 shooting, Lowrimore asked for the .20 gauge shotgun to be returned, so "he could get rid of it permanently." Tr. I-79. Lowrimore told Thomas that "the job was botched" -- "[i]t wasn't completed." Tr. I-80. Lowrimore "kept insisting that he wanted her killed." Tr. I-81. Potter testified that he had no direct conversations with Lowrimore, but he knew from Thomas that the killing was to be done at Lowrimore's direction. Tr. I-162-63.

On appeal, Lowrimore raises numerous issues relating to his trial and sentence.[4] The primary claim of trial error comes from Lowrimore's efforts to keep from the jury the fact that he had been charged in another court with his ex-wife's mur-

[4]We need not addess Lowrimore's contention that he was improperly denied release pending sentencing and appeal. Because we affirm Lowrimore's conviction and sentence, these issues are now moot.

der . The District Court ruled that the government could not mention the Oklahoma indictment during the trial. The defense requested that certain other evidence be excluded, including an autopsy report showing Shirley Lowrimore's cause of death, but the Court allowed both the autopsy report and "any actions [Lowrimore] took up to the murder," so long as the evidence was probative of Lowrimore's intent to commit the crimes of conspiring, aiding, and abetting in the commission of a murder for hire. Tr. I-8. Lowrimore claims the government violated these pretrial evidentiary rulings on two occasions, and because of the resulting degree of prejudice, he says he should have been granted a mistrial.

The first alleged violation concerns the Court's order not to bring up the Oklahoma proceedings. On direct examination of Jimmy Thomas, the government attorney asked: "Did you have any other conversations with Mr. Lowrimore after her death?" Thomas replied: "Yes, sir. It was a little while after he was bonded out after being charged." Tr. I-82. From this point on, Lowrimore maintains, the jury knew about the Oklahoma murder charge, making it impossible for Lowrimore to receive a fair trial.

We dc not agree that a mistrial was warranted. Although Thomas was apparently referring to the Oklahoma murder charge, it is not at all clear that the jury so concluded. The jury could have thought Thomas was referring to charges in this prosecution, or a prosecution in another court unrelated to Shirley Lowrimore's death. Even if the jury understood that Lowrimore had been charged with his ex-wife's murder (and assuming such knowledge was unduly prejudicial), his counsel did not request an instruction to the jury that any other charges or criminal proceedings were irrelevant to the case at hand. Rather, his counsel requested a mistrial -- a remedy reserved for significant, highly prejudicial trial errors. While an instruction to the jury might have been appropriate here, had one been requested, the vagueness of Thomas's answer, and the inadvertent character of the government's conduct, are not sufficiently serious for us to conclude that the District Court abused its discretion in failing to declare a mistrial.

The second alleged violation occurred during the government's cross-examination of Lowrimore. Lowrimore was asked: "What did you do to disguise your identity on the day

of the murder?" Tr. II-222. The District Court overruled defense objections to the question, stating that it did not implicate the Oklahoma murder charge, and was relevant to intent under Rule 404(b) of the Federal Rules of Evidence. Lowrimore then explained that he had been seen wearing a wig "within a couple of hundred yards" of where his wife's body had been found, and that he had worn the wig to conceal his identity. Tr. II-223.

No error occurred here. The jury already knew, and was entitled to know, that Shirley Lowrimore had been murdered. Any evidence linking Lowrimore to her murder is relevant to the crime he was tried for in the District Court -- hiring someone to have Shirley Lowrimore killed. Wearing a disguise in close proximity to where his ex-wife's body was found, and on the same day, tends to prove that Lowrimore murdered his wife. It also tends to prove that Lowrimore wanted his wife dead badly enough to do it himself, which, in turn, makes it more likely he would have hired someone else to do the job. Fed. R. Evid. 404(b) allows evidence of other crimes to prove motive and intent. Of course such evidence is prejudicial, as all relevant evidence invariably

is, so the only question is whether this evidence was unfairly prejudicial, in effect denying Lowrimore a fair trial. We cannot say that it was, particularly since this question was properly within the scope of cross-examination of Lowrimore, who had denied any knowledge of or participation in a scheme to have his ex-wife killed.

Lowrimore also claims he should have been granted a mistrial following an improper statement by the prosecuting attorney during his cross-examination. Counsel for the government concluded his questioning of Lowrimore with: "You know, Mr. Lowrimore, I've seen you testify, this is the third time now, and the main thing that struck me -- I've never seen any remorse that your wife is dead, Mr. Lowrimore." Tr. II-224. We agree that government counsel's statement was improper, not only because he misstated the number of times Lowrimore had previously testified, but also because statements by counsel are not evidence, and should not be offered as such. (At the oral argument, government counsel forthrightly conceded that he should not have made the statement.) The District Court might have instructed the jury to this effect, and that would have been appropriate. However, defense counsel did not

request a limiting instruction, and we conclude that the improper statement was harmless beyond a reasonable doubt in light of all the other evidence against Lowrimore. In any event, the District Court did not abuse its discretion in denying Lowrimore's request for a mistrial.

Lowrimore raises two other trial errors. He contends the District Court improperly limited cross-examination of Thomas's financial status, and that the government failed to prove any connection between Lowrimore and the $350 paid by Thomas to Potter. We have considered both of these claims and have determined them to be without merit.

We do find merit in Lowrimore's challenge to the procedures used at his sentencing, but the error does not require reversal of his sentence. After Lowrimore was convicted, a probation officer prepared a Presentence Report detailing conduct which the officer considered to be relevant to Lowrimore's sentence under the United States Sentencing Guidelines. The officer testified that he prepared much of the Report from the files of the United States Attorney in charge of the prosecution. As a result, the officer reported statements of witnesses whom he had not personally inter-

viewed. Some of the witnesses whose statements were included in the Report had not testified at trial, and the officer admitted that he did not know if their statements had been made under oath. Lowrimore objected to many of the factual statements made in the Report. The only witness presented at sentencing was the probation officer, who testified to the manner of his preparation of the Report. The District Court then placed the burden on Lowrimore to refute the factual statements contained in the Report.

This procedure violated Lowrimore's rights under the Confrontation Clause, contained in the Sixth Amendment to the Constitution of the United States. In United States V. Fortier, 911 F.2d 100 (8th Cir. 1990), a case decided after Lowrimore's trial was completed, we outlined the appropriate procedure to be used at sentencing to avoid Confrontation Clause problems when hearsay testimony is presented. We said:

> The Confrontation Clause requires that the government make its proof in a reliable fashion; the absence of proper confrontation of witnesses calls into question the integrity of the fact-finding process. A court may rely solely upon a presentence report for findings relevant to sentencing only if the facts in

> the presentence report are not disputed by the defendant.

911 F.2d at 103. Hearsay statements used against a defendant at sentencing, over the defendant's objection, violate the Confrontation Clause unless the statements are within well-recognized exceptions to the hearsay rule, or unless the court makes a finding that the statements are otherwise especially reliable. Cf. Idaho V. Wright, 110 S. Ct. 3139, 3145-52 (1990).

Because Lowrimore objected to the hearsay statements contained in the Report, the Court should have decided whether each statement objected to fit within a well-recognized exception to the hearsay rule, or bore some "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980). Calling the probation officer to testify about how he prepared the report did not correct the problem. As we said in Fortier, "[t]he Confrontation Clause requires that district courts not rely on the Presentence Report alone for the required trustworthiness evaluation -- such fact-finding is a judicial function, not to be delegated to staff people." 911 F.2d at 104. The probation officer here had no personal knowledge

of the events; Lowrimore's objections to the sentencing procedure are thus well taken.

The procedural error at sentencing was undoubtedly harmless in this case, however, and we affirm Lowrimore's sentence. The District Court was entitled to rely upon its recollection of testimony at Lowrimore's trial. The hearsay statements in the Report made by Jeremy Parker, Ronnie Woodson, and Harlan Daniel Sweeten, none of whom testified at trial, were inconsequential to the determination of Lowrimore's sentence. The District Court had already heard adequate testimony at trial for each enhancement Lowrimore received: two levels for more than minimal planning, U.S.S.G. § 2A2.1(b) (1); four levels for serious bodily injury to the victim, § 2A2.1 (b) (3) (B); five levels for discharge of a firearm during the offense, § 2A2.1(b) (2) (A); two levels because the conspiracy was motivated by a payment or offer of money (trial testimony indicated Lowrimore was motivated at least in part by an insurance policy on Shirley Lowrimore's life), § 2A2.1(b) (4); and four levels for being an organizer or leader of a criminal activity involving five or more participants, or which was otherwise extensive, § 3B1.1(a).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix B

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1952WA

United States of America,

Appellee,

vs.

Jackie Dale Lowrimore, Sr.,

Appellant.

Appeal from the United States District Court for the Western District of Arkansas

Appellant's petition for rehearing has been considered by the court and is denied.

February 28, 1991

Order Entered at the Direction of the Court:

Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit.